# Trusts, Contract and the Future of Discretionary Powers: the *IBM v Dalgleish* litigation

## Old Library - All Souls College

Dr Daniel Schaffer,
Slaughter and May &
Fraser Campbell, All
Souls and Blackstone
Chambers
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*547898783*

Does the Court of Appeal's decision in ***IBM United Kingdom Holdings*, *IBM United Kingdom Limited v Dalgleish*** signal a retrenchment in judicial protection of employees' legitimate expectations in respect of occupational retirement benefits?

# Employees' expectations as to how employers ought to behave in using powers to change their pension schemes (1)

## Lecturers vote to strike over pension scheme deficit

See comments (1)

By Aamina Zafar

Financial Adviser

Strikes on university campuses are a step closer after staff backed industrial action over their pension.



The ballot by the University and College Union (UCU) showed overwhelming support for industrial action to protect pensions.

It won the support of 87 per cent of UCU members, who voted in the consultative ballot in favour of industrial action to defend the existing benefits of the Universities Superannuation Scheme (USS).

The scheme, the largest private sector pension scheme in the UK, covers the majority of staff mainly in the older "pre-1992 universities" including Oxford, Cambridge, Manchester and Imperial.

There have also been concerns about the scheme's £12.6bn deficit, with employers and members warned they may need to increase contributions by up to 7 per cent to maintain their current benefits.

But this is beyond what universities are willing to pay and Frank Field, chairman of the work and pensions select committee, has written to ministers, the pension regulator and the trustees of the scheme to understand why its deficit has increased £7.3bn in three years.

# Employees' expectations as to how employers ought to behave in using powers to change their pension schemes (2)

The UCU has said benefits from the USS have fallen behind those available for members of the Teachers' Pension Scheme, whose members include staff at post-1992 universities.

Sally Hunt, general secretary of the UCU, said: "This result sends a clear message that UCU members are prepared to take sustained industrial action in order to protect their pensions.

"USS members work at some of the most celebrated universities in the UK and yet their pension benefits are the worst in the sector. Further cuts in benefits will only make this situation worse.

"Staff are totally fed up with being treated poorly by employers who seem only to be interested in defending their own sky-high salaries and bloated pension pots.

"The employers need to act now to avoid a major, damaging dispute at time when universities are already in the news for all the wrong reasons. We hope this ballot result finally concentrates the employers' minds."

Pension negotiations with Universities UK, the representative body for universities, resumed on Thursday but analysis commissioned by USS found universities were able to pay extra to safeguard existing benefits but have so far said they will not.

The UCU said universities have also not done enough to challenge the valuation methodology used by USS, which the union says bears little relation to the underlying health of the scheme.

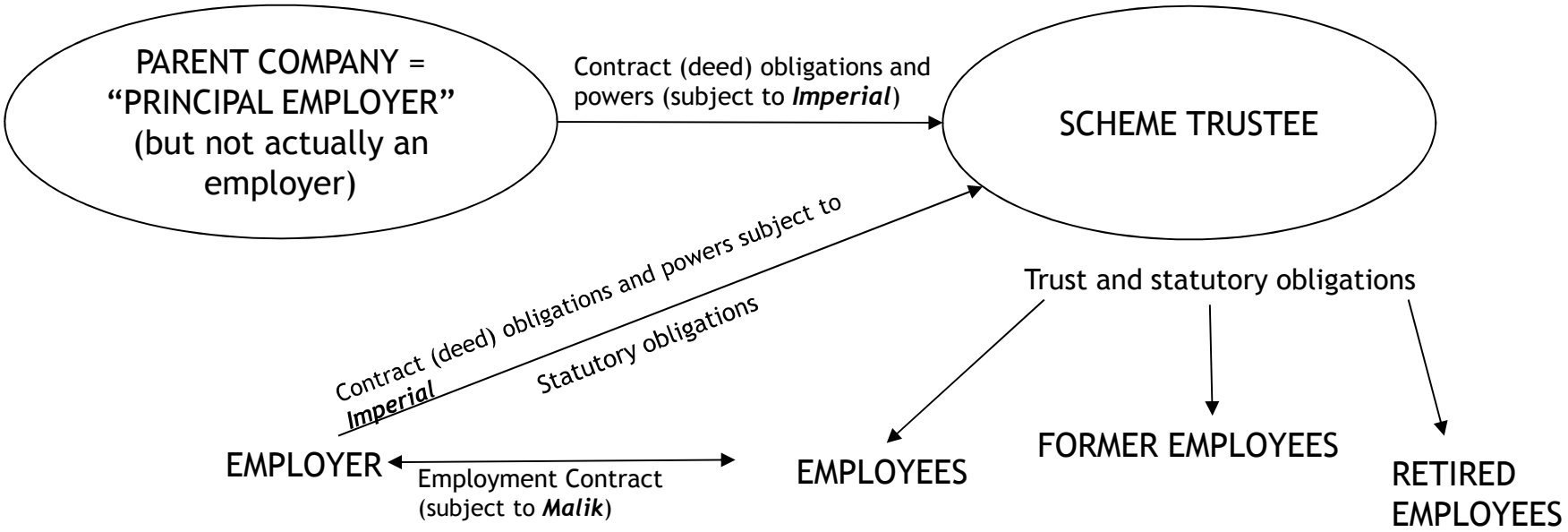
The strike would make lecturers the latest in a string of workers to threaten strikes over their defined benefit pension.

Staff at Royal Mail have voted in favour of industrial action, as have Capita employees and BMW workers.

British Airways has also found itself in dispute with its workers over its plans to close down its DB pension while Marks & Spencer has also closed down its scheme.

Meanwhile Tata has offloaded its £15bn British Steel Pension Scheme onto the Pension Protection Fund, the government's pensions lifeboat, after the scheme proved a millstone around the business's neck, which was at risk of closure last year.

# Pension scheme trusts contain unqualified key powers vested in the employer, non-employer and other members of its corporate group



## High Court in *IBM v Dalgleish* held an employer's exercise of power could be constrained by expectations engendered by the employer

Trustee required IBM to seek court confirmation of the validity of (Project Waltz):

- exercise of unilateral power by non-employer non-fiduciary (IBM Holding) to close the pension schemes to future accrual
- decision by IBM Holdings no longer as a matter of course to exercise its unilateral non-fiduciary discretion to agree to early retirement benefit payment without full actuarial reduction for early receipt
- IBM UK the employer's decision not to make future pay awards unless employee first agreed that the award would be treated as non-pensionable

given Trustee's concerns that in its view the schemes' members had 'reasonable/legitimate' expectations about how powers should be exercised.

## High Court in *IBM v Dalgleish* held an employer's exercise of power could be constrained by expectations engendered by the employer

**Trustee was concerned that IBM would be in breach of its *Imperial* duty to members**

- The *Imperial* duty of good faith - *Imperial Group Pension Trust v Imperial Tobacco [1991]*

  *"46 In every contract of employment there is an implied term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 approved by the Court of Appeal in Lewis v Motorworld Garages Ltd [1985] IRLR 465 . I will call this implied term the implied obligation of good faith. In my judgment, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer. Say, in purported exercise of its right to give or withhold consent, the company were to say, capriciously, that it would consent to an increase in the pension benefits of members of union A but not of the members of union B. In my judgment, the members of union B would have a good claim in contract for breach of the implied obligation of good faith."*

- *IBM v Dalgleish* involved a non-employer decision-maker

## High Court in *IBM v Dalgleish* held an employer's exercise of power could be constrained by expectations engendered by the employer

**Trustee was concerned that IBM would be in breach of its *Imperial* duty to members**

- *Imperial* (and contractual IDT&C) - is a constraint not a positive duty [29]. But it does also apply to deciding not to use a discretion:

  *"29 Thus, the essence of the obligation was said to be the same whether as a duty on the employer under a contract of employment or as a constraint on the exercise of a power such as the Exclusion Power, vested in Holdings in the present case as Principal Employer under the pension schemes, or the power to consent to early retirement, both of which are non-fiduciary discretionary powers. Strictly speaking the phrase "the Imperial duty" is a misnomer or is at least capable of being misleading: it is a constraint or limitation on the use of an apparently unlimited discretionary power..."* [CA]

- Not a positive duty on an employer, *if* exercising a discretion, to be reasonable CA [31] or fair [33]

## High Court in *IBM v Dalgleish* held an employer's exercise of power could be constrained by expectations engendered by the employer

**Warren J:**

*"My judgment is that [IBM] Holdings was in breach of its Imperial duty and of its contractual duty of trust and confidence in imposing the Project Waltz changes and in presenting the members with the choice of signing non-pensionability agreements or receiving no pay increases in the future.*

*1526 My principal reasons for reaching this conclusion are these:*

*i) Project Waltz was clearly inconsistent with the Reasonable Expectations which are established*

*ii) The disappointment of those Reasonable Expectations was a very serious matter going to the heart of the relationship between Holdings and its employees….*

*1535 Viewed as a whole, the Project Waltz changes give rise to a breach by Holdings of its Imperial duty and of its contractual duty of trust and confidence."*

## High Court in *IBM v Dalgleish* held an employer's exercise of power could be constrained by expectations engendered by the employer. Overturned by CA

### CA disagreed with Warren J on law (and facts):

*"463 For the reasons set out above, we respond to the Issues agreed between the parties, in summary, as follows.* This summary does not convey the full meaning and effect of our reasoning and reference must therefore be made to the relevant parts of our judgment as indicated:

*i) Issue 1, the threshold issue: …The judge decided the case on the basis that the Reasonable Expectations which he held to have been generated must be satisfied unless there was no other possible course open to IBM than to disappoint them [76] and following, especially from [217])*

*ii) Issue 2: The judge was wrong to decide that a principal employer's non- fiduciary discretion must be justified as a necessary and appropriate response to the circumstances. Instead he should have applied a rationality test, equivalent to that in Wednesbury as set out in paragraph [46].*

*iii) Issue 5: The judge was wrong to hold that an employer's ability to offer discretionary salary increases on the basis that they would not be pensionable was restricted by the existence of Reasonable Expectations to the contrary. He should have applied a rationality test equivalent to that in Wednesbury, as set out at paragraph [45]."* [Warning NB this is not what para 45 says]

## Does the CA's decision signal a retrenchment in judicial protection, through the *Imperial* and *Malik* principles, of employees' legitimate expectations?

No. Not retrenchment – 4 reasons:

(i) CA corrected but did not retrench

(ii) CA left scope for *Imperial* principle to be used to deliver employees' expectations – through stage 1 of the *Imperial* sub-test of 'irrationality'

(iii) CA left scope for judicial protection of expectations through *Imperial* sub-test of 'perverse'

(iv) CA did not pare back on protection of employees' legitimate expectations provided through *Imperial* sub-test of 'collateral purpose'

# 1. CA corrected but did not retrench (1)

1.1 **Arg 1: *Imperial* does not police use of non-fiduciary discretions in pension trust through a conduct/relationship-damage test**

- *Imperial* is a principle concerned with ensuring that a power is used for its purpose (scope and motivation) and is exercised after proper consideration
- Warren J understood it to be inviting wholesale empirical analysis of the impact of the use of the power on the employment relationship
- IBM successfully submitted to CA that *Imperial* is about managing the power (where power-holder is often not employer and objects may not be employees) not the relationship
- If an employer-employee relationship exists *Malik* operates
- Warren J injected a *Woods* approach into the irrationality sub-test:
  "*the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: ... The conduct of the parties has to be looked at as a whole and its cumulative impact assessed*" ***Woods v W.M. Car Services*** at 670H-671A
- Indicative from Warren J's breach judgment

  *"1382 …if IBM had made statements which, contrary to its position on the facts of the present case, gave rise to Reasonable Expectations, then IBM would need to show that the commercial imperative of meeting the 2010 EPS Roadmap enabled it .. to override those expectations and that doing so would not, objectively, destroy or seriously undermine the relationship of trust and confidence which lies at the root of the Imperial duty"*

# 1. CA corrected but did not retrench (2)

1.2 **Arg 2: *Imperial* polices use of non-fiduciary discretions in pension trust through a *Wednesbury* 'irrationality' test**

- Warren J refers to *Wednesbury* but interprets it as an outcome test - no reasonable decision maker - where the judge decides the outer limit of rationality:

  *"441 Moreover, given that Burton J in Clark v Nomura was equating the test which he described as irrationality or perversity with the test applied in granting judicial review, as he put it 'that no reasonable employer would have exercised his discretion in this way', it seems to me that breach of expectations is, at root, an aspect of irrationality or perversity. In other words, if expectations have been engendered by an employer, that may have been done in such a way that to disappoint those expectations would, absent some special change in circumstances, involve the employer acting in a way that no reasonable employer would act; in which case, irrationality or perversity, as those concepts are to be understood in this context, is established. To that extent, reasonableness does come into the picture. … it is an objective assessment of where the range of reasonable perceptions reaches its limits."*

- CA held:

  *"191 For IBM Miss Rose submitted that although the judge's self-direction at B444 may appear to be correct on its face, the words "in the sense that I have described it", understood as a reference back to B441, show that the test so promulgated is not a true statement of a rationality test equivalent to that in Wednesbury, which we have held to be the correct test in a case of this kind (see paragraph [45] above), so that already at this stage the judge had begun to misdirect himself in law."*

# 1. CA corrected but did not retrench (3)

1.2 **Warren J misunderstood *Wednesbury* 'irrationality' as principally an outcome test**

*"226. Accordingly, as we read the judge's judgment, he failed to apply the Wednesbury test in relation either to Holdings as regards the Imperial duty or to UKL as regards the contractual duty. It seems to us that, in referring to the reasonable employer test, as he often did, he may have incurred the risk identified by Baroness Hale in Braganza at paragraph 29, quoted at paragraph [38] above, that "concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker". In particular, reference to the reasonable employer may lead to the application, even if unconsciously, of a test diluted and distorted from the true test of irrationality, as enunciated, for example, by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 , 410*

> *By 'irrationality' I mean what can by now be succinctly referred to as ' Wednesbury unreasonableness'…It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

# 1. CA corrected but did not retrench (4)

*"227 In what Baroness Hale (quoting both passages at paragraph 23 of Braganza) described as an obvious echo of this, Lord Sumption said this, in Hayes v Willoughby: [2013] UKSC 17, [2013] 1 WLR 935 :*

> *Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions …A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."*

- 'Rationality' test in *Imperial* is logical - creates symmetry with implied term that polices exercise of express or implicit powers in employment contract [36]

# 1. CA corrected but did not retrench (5)

**Good policy reasons for a *Wednesbury*-like test [38-39] [45] [321] – reduces judicial substitution risk**

*"339 ..it is not open to the Court to retake a commercial decision previously adopted by a commercial entity. Nor should the Court assess the legitimacy of IBM UK's actions with the wisdom of hindsight."*

*"38 As to the correct approach, [Baroness Hale in Braganza]* ***drew an analogy with the court's task in relation to a statutory or prerogative-based decision-making function****. Having said at paragraph 28 that the contractual implied term "is drawing closer and closer to the principles applicable in judicial review", she spoke at paragraph 29 of the duty to exclude extraneous considerations and to take into account those considerations that are obviously relevant to the decision in question. She went on to say this:*

> *'It is of the essence of "Wednesbury reasonableness" (or " GCHQ rationality") review to consider the rationality of the decision-making process rather than to concentrate on the outcome.* ***Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.'"***

# 1. CA corrected but did not retrench (6)

**The *Imperial* rationality test is a two stage 90/10 test**

*"39 At paragraph 30 [of Braganza Baroness Hale] said that, absent a context in which an objective standard of reasonableness can be implied, "the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose". **She also said that, in applying the test of rationality, both limbs of the Wednesbury formulation ( Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) should be included: first, have the relevant matters (and no irrelevant matters) been taken into account, and second, is the result such that no reasonable decision-maker could have reached it."***

# 1. CA corrected but did not retrench (7)

1.3 ***Imperial*** **not a mechanism that converts expectations into substantive rights (1)**

*"229…The existence of the Reasonable Expectations, or at any rate the history of the communications to employees in the course of Project Ocean and Project Soto from which the Reasonable Expectations were said to arise, were relevant factors to be taken into account by the decision-maker.* ***But to elevate them to a status in which they had overriding significance over and above other relevant factors was erroneous in law,*** *and therefore vitiates the judge's decision that Holdings was in breach of the Imperial duty and UKL of the contractual duty."*

# 1. CA corrected but did not retrench (8)

1.3 ***Imperial*** **not a mechanism that converts expectations into substantive rights (2)**

*"232 …the judge erred in law. The correct approach is to apply a rationality test equivalent to that in Wednesbury (see paragraphs [45] and [46] above) in order to decide whether a decision by a decision-maker such as Holdings, as Principal Employer under a pension scheme, or UKL as employer, is valid and lawful having regard to the Imperial duty and the contractual duty of trust and confidence.* ***Both limbs of the test can apply, but it was not argued in the present case that any irrelevant matter had been taken into account, or any relevant matter left out of account.*** *Therefore the question was whether the decision taken was one which no rational decision-maker could have reached. Although the judge directed himself that the test to be applied was one of capriciousness, perversity or arbitrariness, which is close to the rationality test, he accorded an overriding substantive significance to the Reasonable Expectations such that they could only lawfully be disappointed in a case of necessity, which is not compatible with the correct approach.* ***Members' expectations, even if they satisfy the judge's criteria for a Reasonable Expectation, do not constitute more than a relevant factor which the decision-maker can, and where appropriate should, take into account in the course of its decision-making process."***

# 1. CA corrected but did not retrench (8)

1.3 ***Imperial*** **not a mechanism that converts expectations into substantive rights (3)**

*"269 If, contrary to our view, Reasonable Expectations were to have a special legal status in relation to the making of such a decision, we agree with IBM that it would be necessary for them to meet standards of clarity and certainty, so that it should be clear enough to all parties concerned (including, in the case of a pension fund, the trustee) whether the particular legal rights and responsibilities that could arise have or have not in fact arisen. We think there is much to be said for IBM's proposition that the standards ought to be equivalent to what is required for a contract or an estoppel. We note the judge's comparison at B533 between a case where there is a binding contract to keep a scheme open for DB accrual until a given date and a case where a Reasonable Expectation to the same effect has arisen from actions of the employer or Principal Employer. There is a clear legal difference between those cases which has nothing to do with the Imperial duty, since in the first case to act inconsistently would be a straightforward breach of contract and in the second it would not. But it seems to us that the basis of this comparison, if it is of any legal relevance, should be that the conduct giving rise to the Reasonable Expectation must meet similar tests to that which would give rise to a contractual obligation, and the content of the Reasonable Expectation must also be comparable to that which would be required for a valid contract."*

# 1. CA corrected but did not retrench (9)

**Discussion points:**

- Sh/could the CA have applied *Imperial* as an outcome test?
- Was CA's room for manoeuvre constrained by the way the case was pleaded and the way Warren J reasoned?

## 2. CA left scope for *Imperial* principle to be used to deliver employees' expectations – through stage 1 of the *Imperial* sub-test of 'irrationality' (1)

- CA had no scope to find against IBM on stage 1 of the *Imperial* (or employment implied contractual) *irrationality* test:

  *"182 In applying the Wednesbury test, the judge did not examine whether Holdings had considered all relevant matters and had excluded from its consideration all irrelevant matters. That is because the RBs did not advance a case on the basis of an error of that kind: see B1531. He therefore had to consider only whether the decision was one which no reasonable decision-maker could have reached.*

  *"232 …the judge erred in law. The correct approach is to apply a rationality test equivalent to that in Wednesbury… **Both limbs of the test can apply, but it was not argued in the present case that any irrelevant matter had been taken into account, or any relevant matter left out of account. ... Members' expectations, even if they satisfy the judge's criteria for a Reasonable Expectation, do not constitute more than a relevant factor which the decision-maker can, and where appropriate should, take into account in the course of its decision-making process."***

  *317 He [Warren J] did not place any reliance on any failure to take members' interests into account and indeed that had not been argued: B1531."*

## 2. CA left scope for *Imperial* principle to be used to deliver employees' expectations – through stage 1 of the *Imperial* sub-test of 'irrationality' (2)

- **Courts can scrutinise closely stage 1 compliance**

*"40. Lord Hodge also said at paragraph 55 [of Braganza] that "the personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process than would be appropriate in some commercial contracts" and said in the following paragraph that the intensity of the scrutiny would depend on the nature of the decision to be made. **A decision as to the cause of death is far removed in this context from, for example, decisions about contractual bonuses**, where the employee is entitled to a bona fide and rational exercise of the employer's discretion. Such an entitlement is capable of enforcement by the court, but **does not allow much scope for an intensive scrutiny** of the decision-making process (paragraph 57)."*

## 2. CA left scope for *Imperial* principle to be used to deliver employees' expectations – through stage 1 of the *Imperial* sub-test of 'irrationality' (3)

- Stage 1 offers scope to a *Braganza*-majority minded judge (***Braganza v BP Shipping Ltd***) if quality of enquiry inadequate

- **Lord Neuberger (with whom Lord Wilson agreed) - minority**

  *"107 One would have to be unusually stony-hearted not to hope that a way could be found to ensure that, having suffered the terrible blow of losing her husband, Mrs Braganza could be spared the additional blows of an inquiry concluding that he had killed himself and the deprivation of a death in service benefit. However, it is the most fundamental duty of a judge to apply the law, even if it sometimes leads to hard consequences in the circumstances of a particular case.*

  *126 ….In my view, neither the conclusion reached by the team nor the consequential opinion formed by Mr Sullivan can be characterised as "arbitrar[y], capricious, pervers[e] [or] irrational", to use Rix LJ's words in Socimer International Bank Ltd v Standard Bank Ltd [2008] Bus LR 1304 , para 66. The two reports are, as I have indicated, impressive both in the extent of the investigations on which they were based and the care with which they were compiled, and the conclusion they reached was carefully and rationally explained, and Mr Sullivan cannot be criticised for relying on them."*

# 2. CA left scope for *Imperial* principle to be used to deliver employees' expectations – through stage 1 of the *Imperial* sub-test of 'irrationality' (4)

**Stage 1 compliance - with a *Braganza*-majority minded judge ?**

**Baroness Hale:**

*"42 Although I would not have phrased the correct approach exactly as Teare J phrased it, in my view he was right to conclude [2012] EWHC 1423 (Comm) at [95] that the investigation team's report and conclusion could not be regarded as sufficiently cogent evidence to justify Mr Sullivan, and hence BP, in forming the positive opinion that Mr Braganza had committed suicide. No one suggests that his decision was "arbitrary, capricious or perverse", but in my view it was unreasonable in the Wednesbury sense, having been formed without taking relevant matters into account."*

**Lord Hodge (with whom Lord Kerr agreed):**

*"49 I am struck by the paucity and the insubstantial nature of the evidence from which BP inferred that Mr Braganza committed suicide. While the six points must be considered in aggregate, the only ones which seem to me to be capable of bearing any weight are (a) his lack of timely record keeping on his last voyage, (b) the evidence in Mrs Braganza's e-mails of his financial worries since his family had settled in Canada and (c) his concerns about the state of repair of his ship and the workload which fell on him as chief engineer as a result. Evidence of some moodiness during the voyage and irritation over the refusal of a bonus added little to the picture. I agree with Baroness Hale DPSC's description, at para 40 above, of the six points on which the investigation team relied as "straws in the wind". Unsurprisingly, the team could not rule out the possibility that Mr Braganza had gone on deck for some work related reason and that he had fallen into the sea by accident."*

## 2. CA left scope for *Imperial* principle to be used to deliver employees' expectations – through stage 1 of the *Imperial* sub-test of 'irrationality' (5)

**Stage 1 non-compliance remedy could deliver expectations**

- IBM case - beneficiaries also did not plead IBM's failure to elicit output from proper employee consultation as necessarily leading to breach by IBM Holdings of *Imperial* stage one *Wednesbury* (because a relevant factor not considered) [only pleaded UKL contractual breach]

- CA therefore rejected beneficiaries' application for injunction against implementation of the decision by IBM Holdings to use its discretion

  *"Issue 21 (Defective Consultation and the Imperial Duty)*

  *435 It will be noted that the judge found only that defective consultation involved a breach of the employer's contractual duty. In paragraph 2(d) of their respondent's notice, the RBs contend that Holdings' conduct in relation to the consultation should also have been taken into account in determining whether there was a breach of the Imperial duty.*

  *436 IBM submits that the RBs did not argue at trial that the defective consultation was a breach of the Imperial duty. It is too late for that matter to be raised now."*

## 2. CA left scope for *Imperial* principle to be used to deliver employees' expectations – through stage 1 of the *Imperial* sub-test of 'irrationality' (6)

- Beneficiaries left with (potential) damages claim for IBM UK's breach of contract [434]
- If *Imperial* breach stage 1 had been pleaded and proved - injunction plus equitable compensation? Puts employee in position if expectation had been taken into account [29]

> *"29 Thus, the essence of the obligation was said to be the same whether as a duty on the employer under a contract of employment or as a constraint on the exercise of a power such as the Exclusion Power, vested in Holdings in the present case as Principal Employer under the pension schemes, or the power to consent to early retirement, both of which are non-fiduciary discretionary powers. Strictly speaking the phrase "the Imperial duty" is a misnomer or is at least capable of being misleading: it is a constraint or limitation on the use of an apparently unlimited discretionary power, as the judge recognised at B372. The judge did say, however, that it could properly be classified as a duty, though a negative duty rather than one which could require the person subject to it to act in a given way: see B471, his discussion between R364 and R379, again between R393 and R396, and his further observations at R431. He held that breach of this obligation could provide the basis for a claim for equitable compensation. These aspects of his judgment have not featured among the issues on the appeal, and we say no more about them than that, in a case in which such issues arise for decision on the facts, what he has said in those various passages is likely to be of value in carrying the debate forward…."*

## 3. CA left scope for judicial protection of employees' expectations through *Imperial* sub-test of 'perverse' (1)

- 47 mentions in CA, 80 in HC breach judgment
- *"perversity … which is close to the rationality test"* [232] but no further analysis of its content
- ***Bramston v Haut*** at [68, 69] suggests perversity involves absurdity as evaluated by the judge
- Baroness Hale, Braganza *"42 Teare J, …was right to conclude ..that the investigation team's report and conclusion could not be regarded as sufficiently cogent evidence to justify Mr Sullivan, and hence BP, in forming the positive opinion that Mr Braganza had committed suicide. No one suggests that his decision was "arbitrary, capricious or perverse", but in my view it was unreasonable in the Wednesbury sense, having been formed without taking relevant matters into account."*

## 3. CA left scope for judicial protection of employees' expectations through *Imperial* sub-test of 'perverse' (2)

*"33 Newey J reviewed and applied the relevant authorities in Prudential Staff Pensions Ltd v The Prudential Assurance Co Ltd [2011] EWHC 960 (Ch), [2011] PLR 239, which was about increases to pensions in payment. Under the rules these were at the discretion of the employer. It had maintained a policy over years of making increases so as, broadly and over time, to keep pace with inflation, but in 2005 it changed that policy. It was argued for the beneficiaries in that case that the company must have regard to members' legitimate expectations and must deal fairly with the members. The judge rejected the notion of a test of fairness, but he said this at paragraph 146:*

> *My own view is that members' interests and expectations may be of relevance when considering whether an employer has acted irrationally or perversely. There could potentially be cases in which, say, a decision to override expectations which an employer had engendered would be irrational or perverse. On the other hand it is important to remember that powers such as that at issue on the present case are not fiduciary. As a result the donee of the power is …entitled to have regard to his own interests when making decisions …That fact must limit severely the circumstances in which a decision could be said to be irrational or perverse."*

## 4. CA did not pare back on protection of employee legitimate expectations provided through the *Imperial* sub test of 'collateral purpose' (1)

- ***Imperial*** – protection of legitimate expectation that refusal to use a discretion cannot be used to bargain away vested rights even if right to surplus on remote contingency (wind up). Net effect – expectations to immediate higher increases maintained

  *"31 We had submissions as to the incidents and features of the two duties, as the judge had. Browne-Wilkinson VC in the Imperial Group case made it clear that the test is not whether the company is acting reasonably; the company is perfectly entitled "to look after its own interests, financially and otherwise, in the future operations of the scheme": [1991] 1 WLR 598H. He said that the obligation of good faith required that the company should exercise its rights "(a) with a view to the efficient running of the scheme established by the fund and (b) not for the collateral purpose of forcing the members to give up their accrued rights in the existing fund subject to this scheme". In that case an existing scheme prohibited the payment of any surplus to the employer. Following a take-over the new owner wished to transfer members to a new scheme under which any surplus could be applied for the employer. That was held to be an improper purpose vitiating the exercise of powers in such a way as to coerce members into agreeing to a transfer to the new scheme."*

## 4. CA did not pare back on protection of employee legitimate expectations provided through the *Imperial* sub test of 'collateral purpose' (2)

***Hillsdown*** – protection of legitimate expectation that discretion should not be used to diminish potential economic value of a right to be considered by a trustee for increases – as a spring board to prevent trustee bargaining away that right

*"32 Knox J's decision in Hillsdown Holdings plc v Pensions Ombudsman [1997] 1 All ER 862 also concerned steps taken by a new owner to transfer its pension liabilities to a scheme under which any surplus could be paid to it. The judge held that it would be a breach of the Imperial duty for the employer to bring in a substantial number of new members to the scheme but to decline to make contributions in respect of such members, thereby resulting in the surplus being reduced for its own benefit: [1997] 1 All ER 890f-g"*

**Does the CA's decision signal a retrenchment in judicial protection, through the *Imperial* and *Malik* principles, of employees' legitimate expectations?**

- No
- Where the merits are strong claimants will need to frame their case through orthodox principles
- *IBM v Dalgleish* sounds a warning to an interventionist judge who will need to tread with care…

## Fraser Campbell
## Fellow All Souls and Barrister, Blackstone Chambers

Topics to be examined:

(i) Breaking down *Malik*: three types of situation where judicial intervention is calibrated differently
(ii) Perils of false analogies between public and private law
(iii) Judicial due deference in the employment field
(iv) Limitations on practical remedies in employment law

## (i) Breaking down Malik: three types of situation where judicial intervention is calibrated differently (1)

An employer must not *"without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"*

*Malik and Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20

## (i) Breaking down Malik: three types of situation where judicial intervention is calibrated differently (2)

- An ever-present duty: applies to a broad range of different circumstances
- Most often seen in constructive dismissal claims: but can be used to seek other remedies
- Judicial supervision of the duty will vary in both content and intensity, depending on the context
- Employer's exercise of specific decision-making powers under a contract or trust
- Employer's exercise (or non-exercise) of residual power to offer a variation of the contract
- Other interactions between employer and employee

## (i) Breaking down Malik: three types of situation where judicial intervention is calibrated differently (3)

*"in cases which … involve the exercise of an employer's discretionary powers, whether express (as in many of the bonus cases, and in Braganza) or implied, then, in our judgment, the effect of the recent case law is that, in order to decide whether the employer's act is or is not in breach of the implied duty, a rationality approach equivalent to the Wednesbury test (including both its limbs) should be adopted, taking into account the employment context of the given case"*

*IBM* at [45]

## (i) Breaking down Malik: three types of situation where judicial intervention is calibrated differently (4)

- Not employment-specific
  - Also seen in commercial contracts: e.g. *Socimer International Bank Ltd v Standard Bank London [2008] EWCA Civ 116*
- Familiar *Wednesbury* test from judicial review: where a power is granted, it is taken to be granted on condition it will be used rationally
- Employment context may inform intensity of scrutiny

## (i) Breaking down Malik: three types of situation where judicial intervention is calibrated differently (5)

A *Wednesbury*-type *"approach is required because the court does not and must not substitute its own decision for that of the decision-maker, in these cases the employer"*

*IBM* at [45] – see also [224]

# (ii) Perils of false analogies between public and private law (1)

## *Wednesbury* vs. public law generally

- The utility of the *Wednesbury* test does not mandate or justify the wholesale importation of public concepts

## (ii) Perils of false analogies between public and private law (2)

**False analogies**

- Indeed, public law analogies are apt to mislead
- e.g. ‘legitimate expectation’ is no basis for ‘Reasonable Expectations’
  - Public law vs. private law context
  - Public law vs. private law limitations (contract, misrepresentation, estoppel etc.)

## (ii) Perils of false analogies between public and private law (3)

***Residual power to offer variation (1)***

*"In cases … concerning pay rises, the employer is not exercising an express or implicit discretion under the employment contract, but … the employer's freedom of operation in relation to the contract may be constrained by the implied duty so as to require the employer to act in a manner which is not arbitrary or capricious. Such cases may not be susceptible to the full application of the Wednesbury test"*

*IBM* at [45] – cf. summary at [462(iii)]

## (ii) Perils of false analogies between public and private law (4)

**Residual power to offer variation (2)**

*"Failure or refusal to offer a pay rise to which the employee is not contractually entitled may in some circumstances be a breach of the implied duty of trust and confidence, as in Transco, but the circumstances have to be extreme"*

*IBM* at [414]

## (ii) Perils of false analogies between public and private law (5)

**Residual power to offer variation (3)**

- Specific to employment
  - About maintaining relationship
  - Standard commercial parties would not expect supervision of residual, extra-contractual discretions
- Public law analogies of limited use: arbitrariness and caprice are common sense concepts – and high hurdles

## (ii) Perils of false analogies between public and private law (6)

### Other employer/employee interactions (1)

- Just common sense? All context-specific?
- Some situations (e.g. workplace language) may be simply jury issues
- Others raise the division between specific powers (full *Wednesbury*) vs. residual powers (limited *Wednesbury*)
  - Performance appraisals?
  - Promotions?
- Limited guidance from both (non-employment) private law and public law
- Except, perhaps, concepts of:
  - Due deference?
  - Remedy limited to declaratory relief?

## (iii) Judicial due deference in the employment field (1)

- *IBM* confirms that taking 'decisions', narrowly defined, remains a matter for the decision-maker: [45] and [224]

- The court will not prevent employers making clear in stark terms that this is the case

## (iii) Judicial due deference in the employment field (2)

*"In our judgment, it was not a breach of the contractual duty for the employer to say that it did not intend to award pay increases in future except on a non-pensionable basis … we cannot see that the firm terms in which the pay increases were to be offered constituted any breach of the relevant duty"*
*IBM* at [421]

## (iii) Judicial due deference in the employment field (3)

### Judicial due deference? (3)

- The CA did not want the courts to run every brewhouse in the land
- So, is *IBM* a warning shot for interventionist courts and tribunals more generally?

## (iv) Limitations on practical remedies in employment law (1)

**Declaratory relief only?**

- Denial of substantive relief is familiar to public lawyers
- So, too, to contract lawyers (at least in theory): cf. tort, where damage is an essential ingredient in a cause of action
- Especially relevant in employment context
  - No injunction to require re-running of flawed consultation: [457]-[461]
  - Difficult to mount damages claims for flawed consultation, e.g. on 'loss of a chance' basis: [458]
- Absent a quick injunction, or acceptance of breach by constructive dismissal, employee may be left without any real remedy

## (iv) Limitations on practical remedies in employment law (2)

**Declaratory relief only?**

- This avoids windfalls / over-compensation
  - e.g. requiring the re-running of the consultation would, given passage of time, leave employees better off than if there had been a proper consultation in the first place
- It reflects the reality that not all breaches sound in (conventional) damages
- Is this good enough?

## List of cases

- ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*** [1948] 1 KB 223
- ***Braganza v BP Shipping Ltd*** [2015] UKSC 17
- ***Bramston v Haut*** [2012] EWCA 1637
- ***Hillsdown Holdings plc v Pensions Ombudsman*** [1997] 1 All ER 862
- ***IBM United Kingdom Holdings v Dalgleish*** [2017] EWCA Civ 1212
- ***Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*** [1991] 1 WLR 589
- ***Malik v Bank of Credit and Commerce International SA (In Liquidation)*** [1998] A.C. 20
- ***Prudential Staff Pensions Ltd v Prudential Assurance Co Ltd*** [2011] EWHC 960 (Ch)
- ***R. v. North and East Devon Health Authority, ex parte Coughlan*** [2001] Q.B. 213
- ***Socimer International Bank Ltd v Standard Bank London*** [2008] EWCA Civ 116
- ***Transco Plc v O'Brien*** [2002] EWCA Civ 379
- ***Woods v W.M. Car Services*** [1981] ICR 666

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